No. 1

Supreme Court, U.S.
FILED

In The

07-855 DEC 14 2007

Supreme Court of The United States

OFFICE OF THE CLERK

VSF COALITION, INC.,

Petitioners,

v.

NICHOLAS SCOPPETTA, BOARD OF TRUSTEES OF THE NEW YORK CITY FIRE DEPARTMENT PENSION FUND, BOARD OF TRUSTEES OF THE NEW YORK CITY FIREFIGHTERS VARIABLE SUPPLEMENT FUND, BOARD OF TRUSTEES OF THE NEW YORK FIRE CITY OFFICERS VARIABLE SUPPLEMENT FUND, THE CITY OF NEW YORK, MICHAEL BLOOMBERG, WILLIAM C. JOHNSON, JR., MARTHA K. HIRST, THE UNIFORMED FIRE OFFICERS ASSOCIATION and ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

PETITION

IRVING ANOLIK
Counsel for Petitioners
500 Airport Executive Park
Nanuet, New York 10954
(845) 352-1340

Appeal Press - (914) 761-3600 (212) 267-6602 (516) 872-1110 (13180)

QUESTIONS PRESENTED FOR REVIEW

EXPLANATORY INTRODUCTION

The petitioners herein are a corporation and more than 2,800 disability or vested right retirees of the Fire Department Pension Fund Sub Chapter II (FDPF) (is collectively, petitioners) are seeking, inter alia the receipt of benefits from: two Fire Variable Supplements Funds (VSFs) - The Fire Fighters Variable Supplements Fund (FVSF) and the Fire Officers Variable Supplements Fund (FOVSF) various forms of accounting of funds disbursed by the FDPF and VSFs and a judgment directing compliance with the requirements of the Internal Revenue Code. The respondents are those listed in the caption.

The instant action concerns the legality of the VSFs and petitioners exclusion from VSF benefits, a matter which has allegedly been extensively litigated in Federal and State Courts and in administrative decisions.

Petitioners vehemently maintain that the courts below who arrogated to themselves to proclaim that the petitioners herein were barred by the Doctrine of *Res Judicata*. The reason the courts below allegedly base their holdings on the Doctrine of Res Judicata is because the courts have assumed that whatever the Police Department did in litigation was automatically binding upon the petitioners herein.

It should be noted that the petitioners herein never participated in any of the actions or cases where the courts below maintained they were barred by the Doctrine of *Res Judicata* and furthermore, petitioners

herein were never given a hearing where witnesses could be called at any time. Lastly, we maintain that under the 5th, 6th and 14th Amendments of the United States Constitution, the petitioners herein have been denied a day in court because they dispute vigorously the assertion that they were in privity with the Police Department or any other agency in the litigation cited by the courts below. Furthermore, that those cases never considered the impact of the Internal Revenue Code violations by the respondents, and we urge this court to recognize that the factual predicate for the determinations of the Police Department litigation are not squarely the same as those involving the present petitioners.

Thus the questions presented for review are the following:

1. Whether this court should consider the interpretation of res judicata by the New York courts which is contrary to the determinations of this court and other Federal courts which is a matter of national importance. Thus should this court grant certiorari and clarify the law with respect to res judicata so there will be no doubt left in the courts of this Country as to what res judicata actually means?

2. Since the lawsuits brought by the Police Department of the City of New York and were not in privity with the Petitioners in those cases, were the courts below justified in imposing the Doctrine of *Res Judicata* against petitioners herein?

3. Since no evidence whatsoever was adduced in the courts below to justify their assumptions that the petitioners herein were in privity with the Police

Department in the cases referred to as justification for invoking the Doctrine of *Res Judicata* against these petitioners, particularly in view of the fact that petitioners were never represented by counsel in those cases and never filed any briefs in support of those cases, whether res judicata was valid?

4. In view of the fact that in all the litigation cited by the courts below, no hearing of an evidentiary nature or trial was ever granted to the litigants, ought this court remand this case forthwith, directing full evidentiary hearings so that a record could be made and granting thereby due process of law to the petitioners therein?

5. Whether the imposition of the Doctrine of *Res Judicata* presupposes the fact that the litigants [the petitioners herein] against whom the doctrine is applied already had their "day in court" which of course is not true under the circumstances of all the cases at bar and this particular case as well because of the VSF Coalition (petitioners) were never parties to those lawsuits and were never in privity with the other litigants in those lawsuits?

6. Since the negotiation of collective bargaining agreements between the City of New York and the Fire Department unions are functions of the executive branch of government, whether the State legislature has the power to modify or alter the terms of a collective bargaining argreement made between the City of New York and the Fire Department unions without the consent of those parties?

7. In view of the fact that when the VSF contracts were formulated and agreed to between the Fire Department of the City of New York and The City of New York, no exclusions of any personnel

whatsoever were provided for, whether this court should therefore direct that the VSF benefits shall apply to the petitioners herein without limitation?

8. Since the petitioners herein were never granted an evidentiary hearing or judicial trial in any of the courts below or any of the courts cited in the courts below in support of the allegations that petitioners were in privity with the litigants in those cases, whether the actions thereby constitute a *bill of attainder* or a judicially recognized component of the *bill of attander*, namely a *bill of pains* and penalties prohibited by the Constitution of the United States. [*United States v. Lovett*, (1946) 328 U.S. 303, 90 L.Ed. 1252, 1259, 66 S. Ct. 1073]?

9. Whether New York's enactment of laws restricting VSF benefits to only non-disability retirees, unjustifiably impaired petitioners' reasonable contractual expectations in violation of the contracts clause of the Federal Constitution?

LIST OF PARTIES

The parties are listed in the caption of this petition, with the exception of the Uniform Fire Fighters Association, are the parties herein.[1]

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1 Counsel for the petitioners contacted the clerk's office of this court and informed them that there are over 2,800 members of the VSF Coalition, Inc. and asked whether all of those members names would have to be included in this petition. Counsel was informed that it would not be necessary and accordingly, although the original complaint in this case did list each of the members of the corporation, those names are not listed in this petition.

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New York State Court of Appeals opinion dated September 18, 2007 denied Appellant's motion for leave to appeal. Said order is reproduced in the appendix at page 1a..

The summary order of the New York State Supreme Court, Appellate Division-Second Department affirmed the order of the Supreme Court, Kings County by date of January 16, 2007. Said Decision and Order is reproduced in the appendix at pp. 2a-4a.

The Supreme Court order dismissing the complaint of the plaintiffs is dated June 6, 2005 and is reproduced in the appendix at pp. 5a-17a.

JURISDICTION

The jurisdiction of this court is predicated upon the discretionary denial of review by the highest court of the State of New York, namely the New York State Court of Appeals which determination was made the 18th day of September 2007.

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STATEMENT OF THE CASE
PRELIMINARY STATEMENT

The courts below granted summary judgment dismissing petitioners' complaint despite the fact that the complaint contains numerous factual allegations which raise significant constitutional and statutory claims, some of which we maintain are first impression. Furthermore, petitioners urge that the issues presented by this action are too weighty, and too well-supported, to be derailed on a motion to dismiss.

New York's enactment of legislation which unjustifiably abrogated petitioners' contractual rights to fringe benefits violated the Contract Clause of the United States Constitution - a conclusion which is not shaken in the slightest by the case of *Castellano v. Board of Trustees,* 937 F2d 752 (2d cir. 1991), which addressed a fundamentally different set of facts.

Additionally, The Uniform Firefighters Association (UFA) and the Uniform Fire Officers Association (UFOA) breached their duty of fair representation to petitioners by negotiating for limited supplemental non-pension benefits available only to those who retired after 1968 with twenty years of service without a disability, and for those who retired with less than twenty (20) years of service between 1968 and 1989, and by refusing to negotiate for fringe

benefits for disabled retirees, pre-1968 retirees and post-1989 retirees with less than twenty (20) years of service.[1]

STATEMENT OF FACTS

Petitioners are retired New York City Firemen, Fire Officers, Wipers, Marine Engineers, Pilots, or Fire Marshals (collectively, "Firefighters"). In that capacity, petitioners - - having served for the minimum number of years required for retirement, or having become disabled during the course of employment or otherwise having become disabled - - currently receive a retirement allowance or pension pursuant to the provisions of the New York State Retirement and Social Security Law and/or Article I and Article IB of the New York Fire Department Pension Fund and/or the Administrative Code of the City of New York.

On or about October 1, 1968, defendant The City of New York ("City") and defendant Uniformed Firefighter's Association ("UFA") entered into a Collective Bargaining Agreement ("1968 UFA Agreement"), That contract delineated the rights, benefits, privileges and obligations of employment as a Firefighter with the City for the period October 1, 1968 to December 31, 1970.

On or about June 2, 1970, defendant Uniformed

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1 The petitioners have been denied viable and valuable fringe benefits earned by petitioners' hard efforts while on the job..*solely* because such petitioners became disabled. Discrimination and the dissemination of VSF benefits on the basis of disability violates Titles I and II of the Americans with Disabilities Act and other relative statutes.

Fire Officer's Association ("UFOA") entered into a similar Collective Bargaining Agreement ("1970 UFOA Agreement") which set forth the rights, benefits, privileges and obligations of employment as a Fire Officer with the City for the period October 1, 1968 to December 31, 1970.

As part of the 1968 UFA Agreement, the City and UFA agreed to sponsor a bill in the State Legislature to provide improvements in pension benefits for firemen; the same agreement made by the UFOA and the City in the 1970 UFOA Agreement. As enhancements to existing pension benefits, both the 1968 and 1970 Agreements provided that ordinary disability retirees would be entitled to 1/40 of their final salary for each year of service a retiree renders over twenty (20) years; that accidental disability retirees who were already entitled to a pension equal to three quarters of their final salary would also get a refund of their pension contributions; and that Firefighters who serve for over twenty years would no longer have to make contributions to the pension system.

The 1968 UFA Agreement and the 1970 UFOA Agreement also provided for the fringe benefit principally at issue here - - a variable supplement fund ("VSF") payable from the proceeds of the Fire Department Pension Fund. The purpose of the variable supplement fund was "to provide a supplemental benefit on a variable annuity basis for

Article I and IB firemen, as determined by the trustees."[2]

In a Bulletin issued by the UFA entitled "All Hands, " UFA President Michael Maye explained the variable supplement fund to the UFA Union delegates: "These excess earnings will be paid as supplementary pension benefits within the concept of the variable annuity." Notably, the Bulletin did *not* refer to the exclusion of any beneficiaries from the variable supplement fund.

Therefore, in 1969, legislation was introduced to provide VSF payments to retired firefighters. A "Supplementary Pension Bill" was passed by both Houses of the Legislature, but was vetoed by Governor Rockefeller because of a technical defect. In the wake of the veto, the then-President of the UFA, Michael Maye, reassured firefighters that they would not be prejudiced by the technical defect in the Bill:

> It should be noted that the money is being invested and when the bill is passed, the interest earned will be used, in accordance with the contract with the City, for the benefits under the Supplemental Pension on a retroactive basis, *applying to all retirees as of October 1, 1968.*

The intent to provide the VSF benefit to *all*

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2 The agreement made clear that all Article I and IB firefighters were covered; all that was left for determination by the trustees was the formula for determining the proceeds of the variable supplement fund.

retired firefighters is made clear in the affidavit of Gerald Ryan, the President of the UFA from 1958 to April, 1968. Mr. Ryan's affidavit explains that he and his fellow board-member, Barney McWeeny, negotiated for the variable supplement fund for *all* firemen, both service and disability retirees, and that during negotiations in April, 1968, just six months prior to the 1968 Agreement, the variable supplement fund was intended for *all* members.

In accordance with the 1968 Agreement, the Legislature enacted Chapter 877 of the Laws of 1970, which amended N.Y.C. Administrative Code § 13-268 et seq. to establish the Firemen Variable Supplements Fund and Fire Officers Variable Supplements Fund. Chapt 877 mandated the creation of a reserve from the profits annually generated by the New York City Fire Department Pension Fund; that reserve was to be transferred annually to a "variable supplements fund" and distributed by the Trustees of such funds in the form of variable supplemental pension benefits. This fringe benefit was for *all* Firemen and Fire Officers who - - like petitioners here - - retired as members of Pension Fund I or IB.

Indeed, § B19-43.00 of Article 5 of Chapter 877 specifically stated that said payments were authorized for pension fund beneficiaries as that term was defined in § B19-40.00 of Article 5 (Firemen) and in § B19-60.0 of Article 6 (Fire Officers). "Pension fund beneficiary" was defined by § B19-40.00 of Chapter 877 to include:

> Any person who (a) receives a retirement allowance by reason of having retired from service as a member of pension fund one or pension fund one-B and as a

> fireman or as a wiper (uniformed), or (b) receives a benefit by reason of election of an option by such a retired fireman or such a retired wiper (uniformed).

Similarly, § B19-60.00 of Chapter 877 defined "pension fund beneficiary" to include:

> Any person who (a) receives a retirement allowance by reason of having retired from service as a member of pension fund one or pension fund one-B and as a fire officer, or (b) receives a benefit by reason of election of an option by such a retired fire officer.

Petitioners, as disabled Firemen and Fire Officer retirees, were and are members of Pension Fund I or Pension Fund I-B and are persons who receive a benefit by reason of the "election" of an option. Thus, each of the petitioners is a pension fund beneficiary as that term is defined in Chapter 877 of the Laws of 1970.[3]

That the intent of the 1968 UFA Agreement and 1970 UFOA Agreement was to extend the VSF benefit to petitioners, notwithstanding the existence of any disability, is made plain in the legislative history. The Bill Jacket to Chapter 877 contains numerous

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3 See also Chapter 877, § B19-43.00(c) (firemen) ("Pension fund beneficiaries shall be eligible to receive variable supplements pursuant to this article, notwithstanding any other provision of law to the contrary"); id. at § B 19-63.00 (fire officers) (same).

references to the fact that the variable supplemental fund was intended for all retirees.[4]

For example, in a memorandum in the bill jacket prepared by Attorney General Louis J. Lefkowitz dated May 13, 1970, he states that "[t]he purpose of this bill is to provide a means to supplement the income of the pension fund beneficiaries." Similarly, in a letter dated April 27, 1970 from Mayor John V. Lindsay, a Trustee of the Variable Supplement Fund, to Governor Nelson A. Rockefeller requesting approval of Chapter 877, Mayor Lindsay specifically states that the variable supplement funds would provide "supplementary payments to retirees of the New York City Fire Department Pension Fund, Article I and the Fire Department Pension Fund, Aritcle I-B," and that "wipers would be included among the retirees who would be eligible for supplements paid by the Fireman's Variable Supplement Fund," and "Pilots, Marine Engineers and Assistant Marine Engineers would be included...in the Fire Officers Variable Supplement Fund."

The history surrounding its enactment, taken together with the language of the act itself, demonstrate that Chapter 877 of the Laws of 1970 provided for benefits to *all* retired Fireman and Fire Officers, both service and disability, in accordance with the terms of the 1968 UFA Agreement and 1970 UFOA Agreement.

On or about January 1, 1971, the City and UFA entered into a subsequent Collective Bargaining Agreement ("1971 UFA Agreement") to delineate the

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4 The Bill Jacket is annexed to the affidavit of Ronald Graboski.

rights, benefits, privileges, and obligations of employment as a fireman with the City of New York for the period January 1, 1971 to June 30, 1973. Like the 1968 UFA Agreement, the 1971 UFA Agreement provided that the variable supplemental fund was intended to benefit "Article I and IB Firemen" like petitioners here; no changes were made with respect to the eligible "pension fund beneficiaries."

Notwithstanding that all Firemen and Fire Officers who were members of Pension Fund Article I and I-B, including disabled retirees, were entitled to receive variable supplement fund benefits under the 1968 UFA Agreement, the 1970 UFOA Agreement, and pursuant to Chapter 877 of the laws of 1970, the Legislature suddenly changed the playing field in 1972: by a purported correction of a "typographical error," disabled firefighters were stripped of the VSF benefits conferred upon them by earlier contracts and legislation. Thus, pursuant to Chapter 1011 and 1012 of the Laws of 1972, the definition of an eligible "Pension Fund Beneficiary" was changed to include:

> Any person who (a) receives a retirement allowance by reason of having retired [from][5] <u>for</u> service as a member of pension fund one or pension fund one-B and as a fireman or as a wiper (uniformed), or (b) receives a benefit by reason of election of an option by such a retired fireman or such a retired wiper (uniformed).

Chapter 1011, § B19-40.00, and:

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5 Material in brackets was deleted in supplemental legislation.

> Any person who (a) receives a retirement allowance by reason of having retired [from] for service as a member of pension fund one or pension fund one-B and as a fire officer, or (b) receives a benefit by reason of election of an option by such a retired fire officer.

Chapter 1012, § B 19-60.0.

These amendments eliminate disabled retirees from the definition of "pension fund beneficiary" and, thus, from the ability to receive variable supplement fund benefits. Taking this valuable fringe benefit from disables retirees contravened the disabled petition retirees' rights under both the 1968 UFA Agreement, the 1970 UFOA Agreement, and the 1971 UFA Agreements (as well as the rights established by Chapter 877 of the Laws of 1970).

Pursuant to Chapter 583 of the Laws of 1989 the Administrative Code was again amended with respect to Firemen who are not disabled, but not Fire Officers, this time to provide, *inter alia*, at 13-5-30, *et seq.*, that Firemen shall on each December 15th commencing December 15, 1989, receive a fixed guaranteed supplemental pension benefit in lieu of a variable supplemental pension benefit. By reason of the foregoing, City Firemen who are not disabled have received since December 15, 1989, and will continue to receive, a guaranteed defined supplemental pension benefit.

Chapter 583 of the Laws of 1989 further narrowed the class of intended beneficiaries of the variable supplement fund by amending the definition

of pension fund beneficiary to require that an eligible retiree must not only retire "for service," but that said retirement must occur after October 1, 1968 and that the eligible retiree must have twenty years of service to be eligible to receive variable supplement fund benefits.

Rendering those who retired prior to 1968, and the service retirees who retired with less than twenty years of service, ineligible to receive VSF benefits also contravened the rights of those petitioners retiring prior to 1968 and/or with less than twenty years of service to collect variable supplement funds as established in the 1968 UFA Agreement, the 1970 UFOA Agreement, and the 1971 Agreements and Chapter 877 of the Laws of 1970.

In addition, pursuant to Chapter 583 of the Laws of 1989, the N.Y.C. Administrative Code provided that a VSF beneficiary receive, commencing December 15, 1989 and on each December 15th thereafter, a fixed guaranteed supplemental benefit, in lieu of a variable supplemental benefit, in accordance with the following schedule:

CALENDAR YEAR	SUPPLEMENT
1989	$3,000.00
1990	$3,500.00
1991	$4,000.00
1992	$4,500.00
1993	$5,000.00
1994	$5,500.00
1995	$6,000.00

CALENDAR YEAR	SUPPLEMENT
1996	$6,500.00
1997	$7,000.00
1998	$7,500.00
1999	$8,000.00
2000	$8,500.00
2001	$9,000.00
2002	$9,500.00
2003	$10,000.00
2004	$10,500.00
2005	$11,000.00
2006	$11,500.00
2007 and each year thereafter	$12,000.00

Thereafter, pursuant to the insistence of the UFA, § 13-101 *et seq.* of the Administrative Code was again amended by Chapter 690 of the Laws of 1990 to extend eligibility for VSF benefits to firemen who retired after July 1, 1968 but prior to July 19, 1989, notwithstanding the fact that said retiree retired with less than twenty years of service. As set forth in the bill jacket retired firefighters with less than twenty years of service would be eligible for variable supplement payments provided said retirees retired between 1969 and 1989, even though it was the position of the City that said retirees were not eligible to receive variable supplement funds.

It's ironic that members of the Fire Department who served twenty (20) years and are injured are hesitant and afraid to mention the fact they have an injury because then they will become ineligible to

received VSF benefits when they retire.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

POINT I
THE COURTS BELOW ERRONEOUSLY APPLIED THE DOCTRINE OF RES JUDICATA BY HOLDING THAT NON-PARTIES WITHOUT PRIVITY CAN STILL BE BOUND BY RES JUDICATA

Basically and fundamentally, it must be recognized that the courts below failed and refused to grant any evidentiary hearing or trial to the petitioners on the grounds that the Doctrine of *Res Judicata,* precluded it.

This was predicated upon the mistaken and erroneous premise on their parts that when the Police Department litigated cases over the last number of years that the petitioners herein were "in privity" and therefore are precluded from entitlement to litigate or have any evidentiary hearings or trial in this case.

We emphasize that in all the litigation that we could find over the years where the Police Department litigated and in the cases cited by the courts below, not one single instance of an evidentiary hearing or trial has ever occurred. The courts below and the cases cited by the courts below ironically have declined to permit any sort of demonstration through evidence and witnesses that their premise that the petitioners are not entitled to VSF benefits is so obvious that no trial or hearing is necessary or warranted. This we

maintain is a violation of due process of law and outrage.

The New York State Supreme Court, Appellate Division, Second Judicial Department rendered an opinion affirming the summary order and summary judgment of the trial court that the petitioners herein were barred by the Doctrine of *Res Judicata* from seeking any relief by reason of the complaint that they filed. In other words, the courts below have taken the position that petitioners' claims are barred by the Doctrine of *Res Judicata* "...since such claims have previously been adjudicated on the merits by either these same petitioners or those in privity with them..." It is obvious we maintain that since the petitioners herein were not in privity whatsoever with the Police Department and were not participants in any of the cases cited by the courts below, there was no possibility that *Res Judicata* could be applied herein.

Where a litigant has not participated in a particular case, and there is no evidence that they were in privity with the litigants in those cases, there can be no bar under the Doctrine of *Res Judicata* to preclude them from litigation on those claims that appear in the complaint herein.

Although the cases cited by the court below indicate that litigation in this area was unsuccessful, when the Police Department litigated them, we urge that this court should recognize that the litigants in the instant case, namely the firefighters and the VSF Coalition, Inc. were not participants in those cases.

This court, namely the Supreme Court of the United States has made it clear in the case of *Blonder-Tongue Labs., Inc. v. University of Illinois Foundation*, 1971, 402 U.S. 313, 329, 91 S.Ct. 1434, 1443, 28

L.Ed.2d 788, the Supreme Court of the United States made it crystal clear that *the courts below are incorrect* by holding that a non-party such as the petitioners herein cannot be estopped from litigating in a matter in which they were not parties because "*due process prohibits estopping them despite one or more existing adjudications of the identical issue which stands squarely against their position.*" Thus, we maintain it is clear that the courts below were holding, contrary to what the Supreme Court of the United States said in *Blonder-Tongue*, supra, that petitioners herein were indeed estopped from litigating in any case where issues concerning the Police Department were involved even though the petitioners were not parties thereto and in no way were in privity thereto. We therefore maintain that the courts below erred in assuming that the petitioners herein were in privity with the Police Department in the cases cited by the courts below and furthermore, there is absolutely no evidence that they were in privity because there was no common counsel, there was no participation and there was no appearance whatsoever on behalf of the petitioners herein in any of those cases.

Thus, it is obvious from the foregoing Supreme Court of the United States case that it is quite clear that a non-party might very well prevail in a lawsuit where the parties such as the Police Department argued one way and in a suit brought by the non-party later on, the decision might well go in a different direction completely. In the leading case on *Coram Nobis* entitled *Lyons v. Goldstein,* 290 NY 19, 47 N.E.2d 425, the highest court of New York, citing decisions of the United States Supreme Court declared at page 25 of 290 NY:

> "If the order of Special Term were to be sustained upon a construction of the foregoing statutes in a manner contrary whether we have above found to be their proper construction, the statutes would be repugnant to the due process clauses of the Constitution of the United States and of the State of New York [citing cases including those in the United States Supreme Court as well]...*which can be satisfied, at least, only when a person may be granted a hearing upon the merits before a competent tribunal where he may appear and assert and protect his rights*....*Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406; *Walker v. Johnston*, 312 U.S. 275, 61 S. Ct. 574, 85 L.Ed. 830; *Whiley v. Johnston*, 316 U.S. 101, 104, 105, 62 S. Ct. 964, 86 L.Ed. 1302. [Italics ours] Although the Constitutions contain no description of those cases in which it was intended to allow or forbid, it was not left to the legislative power to enact any processes which might be devised...."

The courts below appear to have decided questions of law, not paying attention to what should be considered to be fundamental rights of due process, namely granting evidentiary hearings and a trial.

We maintain that this tribunal should at least grant a hearing and certiorari because the issue of *res judicata* is of national importance. *It apparently has been totally misinterpreted and abused and persons*

who have an absolute right to a hearing and trial have been precluded without such hearing and trial and contra to due process of law because of misinterpretations of res judicata.

Res Judicata

"The defense of res judicata is universally respected, but actually not very well liked" (Restatement of Judgments-Second; *Friedenthal, Kane & Miller, Civil Procedure*, 3d Ed. 1999 c 14; *James, Hazard & Leubseorf, Civil Procedure*, 5th Ed. 2001, c. 11. See also *Riordan v. Ferguson*, C.C.A.2d 1945, 147 F2d 983, 988.) In the treatise, *Wright & Kane, Federal Practice and Procedure, Federal Practice Desk Book* § 107 etc. Which is a much respected treatise containing criticism of the doctrine of res judicata to some extent. At page 976-id. The treatise points out:

> "It is clear that more than crowded dockets is involved". Modern scholarship had looked hard at the rules of res judicata and found that they had failed to keep pace with the rules of procedure that they compliment. See, *Vestal, "Res Judicata/Preclusion, 969; Hazard, Res Nova in Res Judicata, 1971, 44 S. Cal. L. Rev. 1036.*

We submit that the courts below have not considered the fact that the litigants, particularly the petitioners herein, have never been given an opportunity to fully litigate their complaints.

That the courts have assumed that certain precedents where the petitioners here were not even

litigants, preclude them from any remedy in this case. Yet, those courts we maintain have failed to recognize that due process has thereby been violated. No hearing has ever been granted so far as we can discern to any litigant in this area. We are asking at the very least that this court grant a full hearing where witnesses can be called and the courts can make a determination based upon the merits.

The cases, particularly Federal cases, make it clear that there not only must be an identity of the issues involved in prior litigation but also an identity of the same parties before the Doctrine of *Res Judicata* can be triggered. Certainly, the City of New York Police Department is not the same party as the City of New York Fire Department. Thus, it is obvious that the parties in the litigation cited below are not the same or identical parties. In the case of *Expert Electric, Inc. v. Levine*, 554 2d 1227 (1977) 2d Cir. The court made it clear that there must be identity of the parties, as well as the issues in successive lawsuits of a similar nature before the Doctrine of *Res Judicata*, which is judicial in origin, is invoked. The court explained that res judicata was a judicial determination that was established for the purpose primarily of avoiding repetitive litigation of the same cause of action by the same parties. (See *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 597, 68 S. Ct. 715, 719, 92 L.Ed. 898 (1933). Going on to explain the res judicata doctrine, the Court of Appeals declared and emphasized that there must be both an identity of the parties, as well as an identity of the issues between the prior and subsequent lawsuits before the operation of res judicata is triggered. (See, *Cromwell v. County of Sac,* 94 U.S.

351, 352, 24 L.Ed. 195 (1876); *Baltimore S.S. v. Phillips*, 274 U.S. 316, 319, 47 S. Ct. 600, 602 (1927) and *McNellis v. First Federal Savings and Loan Association of Rochester New York*, 364 F2d 251, 254 (2d Cir.); cert. denied 385 U.S. 970, 87 S. Ct. 904 (1968).

Explaining the *Doctrine of Privity*, at 554 F2d beginning at page 1233, significantly the Court of Appeals explained:

> The threshold requirement of identity of parties qualified by the Doctrine of Privity, finds its roots in the ancient notion, now supplemented by the due process laws, that a person cannot be bound by a judgment without notice of a claim and an *opportunity to be heard*.
>
> *Whether such identity is evident is a factual determination of substance.* (*emphasis ours*)

POINT II

NEW YORK'S ENACTMENT OF LAWS RESTRICTING VSF BENEFITS TO NON-DISABILITY RETIREES UNJUSTIFIABLY IMPAIRED PETITIONERS' REASONABLE CONTRACTUAL EXPECTATIONS IN VIOLATION OF THE CONTRACTS CLAUSE OF THE FEDERAL CONSTITUTION.

A state law violates the contract clause if it substantially impairs a contractual relationship and is

not justified by a "significant and legitimate public purpose", such as the "remedying of a broad and general social or economic problem" *(Energy Reserves Group, Inc. v. Kansas & Light Co.*, 495 U.S. 400, 411 (1983).

The state laws at issue here not only substantially impair plaintiffs' bargaining for rights to VSF benefits...they eviscerate those rights entirely.[6]

Such a severe impairment increases the level of scrutiny to which the legislation is subjected.

Heightened scrutiny also is required since the collective bargaining agreements at issue here - - entered into between the City and Firefighters' unions - - were public contracts. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977).

Because the laws petitioners challenge here were enacted, at best, to benefit a narrow class of retirees (not the general public), and, at worst, invidiously to discriminate against the disabled, and particularly since these laws represent the State's first attempt to regulate VSF benefits, they unfairly infringe upon petitioners' settled contractual expectations in violation of the Contracts Clause.

A. The Challenged Laws Substantially Impair Petitioners' 1968 and 1970 Contractual Rights and Expectations

There can be no serious question that Chs. 1011

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6 See U. S. Const., Art. I, § 10 Cl. 1 ("No states shall...pass any Law impairing the obligation of Contracts...").

and 1012 of the Law sof 1972 and Ch. 583 of the Laws of 1989 impair the rights, benefits and privileges afforded to petitioners under the 1968 UFA Collective Bargaining Agreement and the 1970 UFOA Agreement. The relevant inquiry is whether the impairment is *de minimis* or substantial. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978) ("[m]inimal alteration of contractual obligations may end the inquiry at its first stage [while] [s]evere impairment...will push the inquiry to a careful examination of the nature and purpose of the state legislation").[7] In short, a state law that prevents a contracting party from achieving gains it reasonably expected from the contract must be subjected to careful examination. *Energy Reserves*, 459 U.S. at 411.[8]

Respondents vainly attempt to avoid subjecting the challenged laws to scrutiny by invoking the Second Circuit's decision in *Castellano, supra*, 937 F.2d 752. The respondents' argument rests on the premise that *Catellano* considered and rejected a claim "identical" with the one at issue here. That premise is simply wrong. *Castellano* merely *appears* to be similar; in fact, it is critically distinguishable from this case.

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7 Of course, petitioners need not demonstrate that their contractual rights were "totally destroyed." *United States Trust Co.*, 431 U.S. at 27.

8 Careful examination is required in view of the importance that the Framers placed upon contractual expectations:

> Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them. *Allied Structural Steel*, 438 U.S. at 245.

To be sure, the disabled retired police officers in *Castellano* - - like petitioners here - - claimed that a collective bargaining agreement had provided them with VSF benefits which state law impermissibly had abrogated. But the police officers' argument - - that since the police officers had not been excluded by the Contract, they must have been included as beneficiaries - - was deeply flawed. As Judge Pratt noted, the collective bargaining agreement at issue in *Castellano* "sa[id] *nothing* about who may be the beneficiaries." *Castellano*, 937 F.2d at 757 (emphasis supplied). Since the contract itself did not provide the sought-after benefits to the disabled police officers, the state law which provided those benefits to other retirees imposed "absolutely no impairment" on the disabled retirees' contractual rights or expectations. *Id.*

Petitioners' Contract Clause argument here is nothing like the claim rejected in *Castellano*. The contracts which petitioners bargained for and won - - the 1968 UFA Agreement and the 1970 UFOA Agreement - - made clear that the beneficiaries of the supplemental benefit were to be "Article I and IB firemen." Each of the petitioners, as a member of Article I or IB as set forth in the 1968 UFA Agreement and 1970 UFOA Agreement, was thus a beneficiary under those contracts. Petitioners therefore had an expectation of variable supplement benefits. See *Allied Structural Steel*, 438 U.S. at 245 (parties entitled to rely on rights created by contracts); *Ass'n of Surrogates v. State of N.Y.*, 940 F.2d 767, 772 (2d Cir. 1991). The challenged state laws abrogated petitioners' status as beneficiaries and interfered with their contractual expectations, thereby substantially impairing - -

indeed, eviscerating - - petitioners' contractual rights.[9]

POINT III

A BILL OF PAINS AND PENALTIES WHICH COMES WITHIN THE PURVIEW OF THE BILL OF ATTAINDER SECTION OF THE UNITED STATES CONSTITUTION IS A LEGISLATIVE ACT WHICH INFLICTS PUNISHMENT WITHOUT A JUDICIAL TRIAL.

As we have pointed out supra, the petitioners herein have been denied any sort of evidentiary hearing or trial. Nonetheless, they have suffered substantial punishment by reason of loss of income and benefits that we maintain that what the legislature did in this case may be a Bill of Pains and Penalties. This is prohibited under the Bill of Attainder Prohibition of the United States Constitution. In the common law definition a Bill of Attainder which was first set forth by the United States Supreme Court in *Cummings v. Missouri* is "a legislative act which inflicts punishment

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9 Even if this Court were to determine that the 1968 UFA Collective Bargaining Agreement and 1970 UFOA Agreement were not clear as to the beneficiaries, as the court in *Castellano* determined, the implementing legislation, Ch. 877 of the Laws of 1970 clearly provides that members of pension fund I or pension fund I-B who retire *from* service were to receive the variable supplement fund. As the Second Circuit in *Castellano*, stated: "Where the statute speaks with clarity, the statute is the only safe guide through the arcane area of public employees' pension rights." *Castellano*, 937 F.2d at 757 quoting *DiGiacomo v. City of New York*, 397 N.Y.S. 2d 632, 642 (1977) (Silverman, J., dissenting in part), rev'd 414 N.Y.S.2d 690 (1979) (based on Justice Silverman's dissenting opinion).

without a judicial trial" (*Cummings v. Missouri*, 1867 U.S.) 4 Wall 277, 18 L.Ed. 356, 363. In the case of *United States v. Lovett*, (1946) 328 U.S. 303, 90 L.Ed. 1252, 1259, 66 S. Ct. 1073 this court explained:

> "Legislative acts no matter what their form, that apply to either named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."

When punishment imposed was less then death, the statute historically is known as a bill of pains and penalties.

Practically all the American precedents are bills of pains and penalties, which include not only fines and forfeitures of goods and lands, but also deprivation of various political and civil rights and privileges. Thus, a Bill of Attainder may affect the life of the individual or may confiscate his possessions, or may do both. (*Fletcher v. Peck* (1810) 6 Cranch 87, 138, 3 L.Ed. 162, 178).

American precedents do not consider the corruption of blood for forfeiture to a state a necessary element of a Bill of Attainder.

POINT IV
THE ATTORNEY GENERAL OF THE STATE OF NEW YORK HAD BEEN MADE AWARE BY THE PETITIONERS OF THE DEPRIVATION OF THEIR RIGHTS WITHOUT DUE PROCESS OF LAW BY VIRTUE OF THE ACTIONS OF THE RESPONDENTS. THE ATTORNEY GENERAL REFUSED TO INTERVENE AND PETITIONERS THEREFORE SOUGHT TO UTILIZE THE DOCTRINE OF *QUI TAM* IN ORDER TO EXERCISE THE FUNCTIONS OF THE ATTORNEY GENERAL WHO REFUSED TO ASSIST THEM IN WHAT THEY CONSIDER TO BE AN IMPORTANT CONSTITUTIONAL RIGHT. WE SUBMIT THAT THE ATTORNEY GENERAL OUGHT TO BE DIRECTED TO INTERVENE IN THIS MATTER SO AS TO PROTECT THE RIGHTS OF THE PETITIONERS.

The Attorney General of the State of New York has previously objected to being included in the lawsuit started by the petitioners in the Supreme Court of the State of New York, County of Kings. In a prior litigation, the Attorney General's position was upheld by the Appellate Division of the Supreme Court, Second Judicial Department in effect stating that the Attorney General could not be compelled to intervene if he didn't want to.

The matter went to the New York Court of Appeals which did not pass upon the issues stating that it was not final in nature and consequently no determination by the Court of Appeals was ever obtained.

We maintain that under the Doctrine of Que Tam if the Attorney General refuses to act in a matter effecting the constitutional rights of the citizens of New York, an action under the Doctrine of Que Tam is appropriate and we ask this court to so hold. Article V, Section 7 of the NY Constitution was violated.

CONCLUSION

We submit that the determination of the New York courts on the question of res judicata is of national impact because of the fact that the doctrine has been so distorted by the lower courts in this case that the petitioners herein were deprived of a constitutional right under due process of law to bring legal action against respondents on the grounds that another branch of government, namely the New York City Police Department had litigated somewhat similar matters on prior occasions, occasions wherein the petitioners herein were not involved directly or indirectly, did not appear, did not assist and in general, were not in privity with those lawsuits under any circumstances.

We maintain that this court should take jurisdiction under a Writ of Certiorari through the New York Court of Appeals in order to clarify, once and for all, what it has previously said in cases that unless the parties to a prior lawsuit have actually involved themselves, they cannot be precluded from bringing a lawsuit despite the fact that a similar lawsuit proved unsuccessful brought by another branch of government.

We say the cases below and the instant case are not identical because there are other factors involved,

particularly involving the Internal Revenue Service of the United States where the issue of the City of New York using pension money for their own debts and obligations without the consent of the petitioners, subjected them to the City of New York to over a one hundred and seventy-six million dollars, ($176,000,000.00), and violations of the tax code.

The fact that the IRS at the moment has refused to enforce the hundred and seventy-six million dollar obligation does not bear on the prejudice to the petitioners herein.

If the interpretations of res judicata as interpreted by the State Courts of New York are allowed to stand, it will constitute a very serious violation of the rights of litigants to bring lawsuits in general. The petitioners herein are citizens of the State of New York and the United States and have a perfect right to bring the lawsuits they sought to bring against the respondents despite the fact that a different branch of government, namely the Police Department, litigated somewhat similar matters but not identical, on prior occasions in which cases the respondents were not in privity and did not appear or involve themselves at any time.

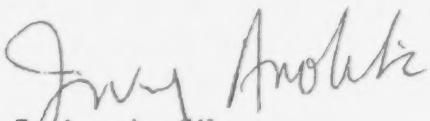
Thus, a matter of national importance should be addressed by this court with respect to res judicata.

Additionally, the petitioners maintain that they are entitled to VSF benefits on the basis of the positions they have taken supra and on the basis of the fact that they have been severely prejudiced by the failure and refusal of the courts of New York to allow them to redress their grievances and to bring a lawsuit. They have been denied any meaningful hearings in the sense of calling witnesses or a trial. In

all instances the courts have undertaken to decide these matters on the grounds of res judicata despite the fact that the definitions of res judicata are contrary to prior holdings of the Supreme Court of the United States and of the Federal Courts. There is no identity parties and no complete identity of issues. (*Blonder-Tongue Labs v. University of Illinois Foundation, supra*, 402 U.S. § 313, 329

Based upon the foregoing the petitioners respectfully move this court to grant a Writ of Certiorari or in the alternative to remand this case with instructions to grant an evidentiary hearing and trial to the petitioners.

Respectfully Submitted,



Irving Anolik
Attorney for Petitioners
500 Airport Executive Park,
Suite 502
Nanuet, New York 10954
Tel. 845-352-1340

APPENDIX

State of New York,
Court of Appeals

At a session of the Court, held at Court of
Appeals Hall in the City of Albany
On the eighteenth day
of September 2007

Present, HON. JUDITH S. KAYE, Chief Judge, presiding.

2-10 Mo. No. 752
VSF Coalition, Inc., et al.,
Appellants,

v.

Nicholas Scoppetta, et al.,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks leave to appeal as against the Uniformed Firefighters Association, be and the same hereby is dismissed as untimely (see CPLR 5513[b]); and it is

ORDERED, that the said motion for leave to appeal otherwise be and the same hereby is denied.

Stuart M. Cohen
Clerk of the Court

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

_____AD3d ____ Argued - December 4, 2006

HOWARD MILLER, J.P.
REINALDO E. RIVERA
GABRIEL M. KRAUSMAN
GLORIA GOLDSTEIN, JJ.
DECISION & ORDER

2005-06827 DECISION & ORDER

SF Coalition, Inc., et al., appellants, v
Nicholas Scoppetta, et al., respondents.

(Index No. 17013/03)

Irving Anolik, New York, N.Y., for appellants.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Edward F. X. Hart and Marta Ross of counsel), for respondents Nicholas Scoppetta, Board of Trustees of New York City Fire Department Pension Fund, Board of Trustees of New York City Firefighters Variable Supplement Fund, Board of Trustees of New York City Fire Officers Variable Supplement Fund, City of New York, Michael Bloomberg, Martha K. Hirst, and William C. Thompson, Jr., s/h/a William C. Johnson, Jr.

Sullivan Papain Block McGrath & Cannavo, P.C., New York, N.Y. (Michael N. Block and Stephen C. Glasser of

counsel), for respondent Uniformed Firefighters Association. Pryor Cashman Sherman & Flynn, LLP, New York, N.Y. (Richard M. Betheil and Joshua Zuckerberg of counsel), for respondent Uniformed Fire Officers Association.

In an action, inter alia, to recover variable supplement fund benefits which were allegedly improperly denied to firefighters on disability retirement, and for an accounting of certain funds disbursed by the respondent New York City Fire Department Pension Fund and variable supplement funds, the plaintiffs appeal from an order of the Supreme Court, Kings County (Solomon, J.), dated June 6, 2005, which granted the motion of the defendants Nicholas Scoppetta, Board of Trustees of New York City Fire Department Pension Fund, Board of Trustees of the New York City Firefighters Variable Supplement Fund, Board of Trustees of the New York City Fire Officers Variable Supplement Fund, City of New York, Michael Bloomberg, Martha K. Hirst, and William C. Thompson, Jr., s/h/a William C. Johnson, Jr., the separate motion of the defendant Uniformed Firefighters Association, and the separate motion of the defendant Uniformed Fire Officers Association for summary judgment dismissing the complaint insofar as asserted against them.

ORDERED that the order is affirmed, with one bill of costs payable to the respondents appearing separately and filing separate briefs.

The Supreme Court correctly determined that the plaintiffs' claims are barred by the doctrine of res judicata, since such claims have previously been

adjudicated on the merits by either these same plaintiffs or those in privity with them (see e.g. *Castellano v City of New York*, 142 F3d 58; Castellano v *City of New York*, 251 AD2d 194, 194-195, cert denied 326 US 1131; *Cinotti v Giuliani*, 5 Misc 3d 1007[A]). Further, the creation of variable supplement funds (hereinafter VSF) and the legislative limitations on their distribution have survived numerous challenges under a variety of legal theories, including those raised by the instant plaintiffs (see *Castellano v City of New York*, 142 F3d 58, supra; *Gagliardo v Dinkins*, 89 NY2d 62, 74-75).

Since the plaintiffs are not entitled to VSF funds, they are "not impaired by the transfer of excess pension fund earnings to the VSFs" and "lack standing to challenge the transfer of assets from the VSFs to the City of New York" (*Gagliardo v Dinkins*, supra at 76). The plaintiffs claim that they may challenge the alleged improper transfer of funds in a "qui tam" action. However, as this court previously held on a prior appeal by the plaintiffs in this action, "inasmuch as a qui tam action is a creation of statute . . . the plaintiff was not authorized to bring such an action in the place of the defendant Attorney General" (*VSF Coalition v Scoppetta,* 13 AD3d 517, 518).

MILLER, J.P., RIVERA, KRAUSMAN and GOLDSTEIN, JJ., concur.

Dated: January 16, 2007 ENTER:

James Edward Pelzer

Clerk of the Court

At an 1AS Term. Part 22 of the Supreme Court of the State of New York, held in and for the County of Kings. at the Courthouse, at Civic Center, Brooklyn, New York. on the 6th day of June, 2005.

PRESENT:

HON. MARTIN M. SOLOMON,

Justice.

VSF COALITION, INC., et al.

Plaintiffs,

- against -

NICHOLAS SCOPETTA, et al.

Defendants.

The following papers numbered 1 to 10 read on this motion

Notice of Motion Affidavit (Affirmation) ,	1-2, 5-6, 8-9
Opposing Affidavits	3
Reply Affidavits	4,7,10

Upon the foregoing papers in this action by plaintiffs VSF Coalition, Inc. and more than 2,800 disability or vested right retirees of the Fire Department Pension Fund, Subchapter II (FDPF)

(collectively, plaintiffs) seeking. inter alias the receipt of benefits from two Fire Variable Supplements Funds (VSFs)—the Firefighters' Variable Supplements Fund (the FVSF) and the Fire Officers' Variable Supplements Fund (the FOVSF),various forms of accountings of funds disbursed by the FDPF and VSFs, and a judgment directing compliance with the requirements of the Internal Revenue Code, defendants Nicholas Scoppetta, as Commissioner of the New York City Fire Department; The Board of Trustees of the New York Fire Department Pension Fund, Subchapters I and 2; the Board of Trustees of the Firefighters' Variable Supplements Fund; the Board of Trustees of the Fire Officers' Variable Supplements Fund; The City of New York; Michael Bloomberg, Mayor of the City of New York; William C. Thompson. IL. Comptroller of the City of New York; and Martha K_ Hirst, Commissioner of Citywide Administrative Services (collectively, the Municipal Defendants) move for summary judgment dismissing plaintiffs' complaint as against them based upon the grounds that the complaint fails to state a cause of action and that plaintiffs lack standing to assert their claims. Defendants The Uniformed Fire Officers Association (the UFOA) separately moves for summary judgment dismissing plaintiffs' complaint as against it, and awarding it the attorney's fees and costs incurred by it in making its motion. Defendant The Uniformed Firefighters Association (the UFA) also separately moves for summary judgment dismissing plaintiffs' complaint as against it based upon the grounds that plaintiffs' claims as against it are barred by the applicable Statute of Limitations and because the complaint fails to state a cause of action.

The instant action concerns the legality of the VSFs and plaintiffs' exclusion from VSF benefits, a matter which has already been extensively litigated in the Federal and State courts and in administrative decisions (see e.g. *Castellano v City of New York*, 142 F3d 58 [2d Cir 1998], affg *Grabaski v Giuliani*, 946 F Supp 249 [SD NY 19961 and *Graboski v.Giuliani*, 937 F Supp 258 [SD NY1996], cert denied 525 US 922 [1998] and 525 US 820 [1998] [*Castellano* 1.1],- Castellano v Board of Trustees of Police Officers' *Variable Supplements Fund*, 937 F2d 75212d Cir 1991], affg 752 F Supp 98 [SD NY 1990], cert denied 502 US 941 [1991] *[Castellano I]; McDonough v City of New York,* 2000 WL 1804137 [SD NY 2000]; *Gagliardo v Dinkins*, 89 NY2d 62 [1996], affg 223 AD2d 371 [1996]; *Ballentine v Koch*, 89 NY2d 51 [1996], affg 224 AD2d 320 [1996]; *Castellano v City of New York,* 251 AD2d 194 [1998], appeal dismissed by 92 NY2d 919 [1998], leave to appeal denied by 92 NY2d 817 [1998], cert denied 526 US 1131 [1999] *[Castellano III]; Matter of Bergamine v Patrolmen's Benevolent Assn. of City of New York*, 202 AD2d 201 [1994]; *Poggi v City of New York*, 67 NY2d 794 [1986], affg 109 AD2d 265 [1985]). The two VSFs at issue, the FVSF and the FOVSF, were established as a result of collective bargaining negotiations in 1968 between the City and representatives of the UFOA and the UFA. To establish the VSFs, legislation, pursuant to Chapter 877 of the Laws of 1970, was enacted that made the VSFs available only to service retirees. Service retirees are firefighters who served 20 or more years in the Fire Department before retirement.

VSFs for service retirees of the Police Pension Fund, Subchapter 2 (PPF), with provisions identical to

those of the FVSF and the FOVSF, were created at the same time, also as a result of collective bargaining negotiations between the City and Union representatives. The Police Officers' and Police Superior Officers' VSFs (the POVSF and the PSOVSF) were established by Chapter 876 of the Laws of 1970. Similar VSF programs, pursuant to Chapters 844 and 846 of the Laws of 1987, for the Transit Police Officers' and Transit Police Superior Officers' VSFs (the TPOVSF and the TPSOVSF) and the Housing Police Officers' and Housing Police Superior Officers' VSFs (the HPOVSF and the HPSOVSF) were created for service retirees of the New York City Transit and Housing Police Forces who were then members of the New York City Employees' Retirement System (NYCERS) and, in 1999 (later amended in 2000 pursuant to Chapter 255 of the Laws of 2000), for Corrections Officers and Corrections Captains and Above who are members of NYCERS.

Starting in 1988, as the result of collective bargaining, each of the eight VSFs then in existence was restructured from being a variable discretionary benefit to a statutorily defined benefit plan requiring payments to each eligible beneficiary on a fixed schedule, beginning with a minimum amount and increasing annually until 2007. The Corrections Officers' VSF was established in 2000 with a defined benefit payment schedule identical to those already in existence for the other eight VSFs. Chapter 583 of the Laws of 1989 converted the discretionary FVSF benefit to a defined annual benefit and, thereafter, Chapter 480 of the Laws of 1993 converted the discretionary FOVSF benefit to a defined annual benefit.

Since plaintiffs, who consist of more than 2,800 disability or vested right retirees of the FDPF, did not retire for service, they were statutorily ineligible to receive VSF benefits under the variable scheme, while it was in existence, and are currently ineligible for benefits under the defined benefit payment scheme; as noted above, such benefits are distributed only to service retirees of the FDPF (see Administrative Code of City of NY §§ 13-383, 13-393 [5]). In September 2003, plaintiffs brought the instant action against defendants, alleging six causes of action. The second cause of action against the Attorney General was dismissed by court order dated February 11, 2004. The first and sixth causes of action seek various forms of accountings of funds disbursed by the FDPF and VSFs. The fourth cause of action seeks a judgment "directing defendants to cease and desist from using pension fund money to exonerate or pay for municipal obligations" and to "comply with the requirements of the Internal Revenue Code." The third cause of action claims that plaintiffs are entitled to be paid "in the same amount and to the same extent as was and is being paid to other retired members of the [FDPF]," and the fifth cause of action claims that the City's refusal to pay them VSF benefits constitutes a "manifest injustice." Said third and fifth causes of action seek the receipt of VSF benefits.

In addressing the Municipal Defendants' motion for summary judgment, the court notes that while plaintiffs assert, in their third and fifth causes of action, that they are entitled to be paid VSF benefits and that the City's refusal to pay them such benefits constitutes a manifest injustice, such assertion is contrary to rulings in prior litigation brought by non-

"for service" (disability and vested rights) retirees of the FDPF, or by the PPF and NYCERS, who have been held to be in privity with them (see *Castellano III*, 251 AD2d at 194), and who challenged the analogous VSFs applicable to them. In such litigation, the VSF statutes have withstood challenges under a variety of legal theories, including Federal constitutional and statutory challenges, as well as State constitutional and statutory challenges, and the courts therein have found that the legislative determination to limit VSF benefits to service retirees passes muster under the Constitutions and statutes of both this State and the United States (see *Castellano* IL 142 F3d at 73-74; *Castellano* 1,937 F2d at 757-758; *McDonough*, 2000 WL 1804137 at * 2-8; *Castellano III*, 251 AD2d at 194-195: *Matter of Bergamine*, 202 AD2d at 202).

Plaintiffs, in the case at bar, premise their allegations that they are entitled to VSF benefits upon their characterization of VSF benefits as non-pension deferred compensation for services rendered. They argue that as such, they are being denied compensation for services they rendered while on the job, and that the mode of retirement should not detract from the fact that the work was rendered, entitling them to compensation. In support of this argument, plaintiffs rely upon language in the *Gagliardo* (89 NY2d at 74-75) decision, wherein the Court of Appeals stated:

> "The [VSFs] were created through collective bargaining as additional future compensation for services actually rendered by police officers [or firefighters] within the bargaining unit during the life of the agreement. In addition, these

> supplemental benefit payments also serve the important purpose of attracting and retaining qualified candidate-officers and providing an inducement to remain in active police [or firefighting] service."

This very same argument, however, was rejected by the Second Circuit Court of Appeals in *Castellano* 11(142 F3d at 71), when it examined this identical claim made by the instant plaintiffs when they were the *Graboski* appellants therein. With respect to said language in *Gagliardo,* the Second Circuit, in *Castellano* 11 (142 F3d at 71), expressly noted that "Nile *Graboski* appellants [had] pointed] to an isolated statement in the New York Court of Appeals' opinion in Gagliardo for the proposition that the statutory scheme entitles police officers and firefighters to VSF benefits regardless of disability status." It found, however, that the Court of Appeals' "characterization of the VSFs as `inducement[s] to remain in active . . . service' undermine[d] [the *Graboski]* appellants' position that the benefits constitute deferred compensation" (id.). It held that "[t]tle fact that the level of VSF benefits does not vary by years served [wa]s a further indication that the VSF is not bargained-for compensation for services rendered," and that when the statement in *Gagliardo* was taken in the context of its ultimate holding (i.e., that the VSF program did not violate Title II of the ADA), the statement did not support the *Graboski* appellants' claim (id.).

Plaintiffs argue, however, that they should not be barred by the doctrine of res judicata from relitigating this same issue here. They contend that the Second Circuit, in *Castellano* 11(142 F3d at 71),

incorrectly ignored and disregarded the definition of the VSFs, as set forth in the above-quoted language of the *Gagliardo* decision, in violation of provisions of State sovereignty. Plaintiffs rely upon the statement of the Second Circuit court in *Castellano* 1 (937 F2d at 759) that it would be imprudent for it to determine a State constitutional claim. They assert that such disregard has created a manifest injustice upon which the jurisdiction of this court may be properly based. Such argument must be rejected. This court cannot and will not overrule the decision of the Second Circuit Court of Appeals.

Moreover, in *McDonough* (2000 WL 1804137 at * 6), a case which is similar to the one at bar, the United States District Court for the Southern District of New York, in considering the Court of Appeals' statements in the *Gagliardo* decision, specifically held that the claim of the plaintiff-disability or vested right retirees therein to VSF benefits were barred by the doctrine of res judicata. Indeed, the Federal district court, in *McDonough* (2000 WL 1804137 at * 7), rejected the identical argument, now made by plaintiffs, that it should "determine that the deprivation of VSF benefits for the plaintiffs and the prior administrative and judicial determinations authorizing those actions constitute 'manifest injustice' that [it] should exercise its equitable jurisdiction to remedy," and that it should "overrule the previous four federal and state decisions [i.e., *Castellano I Castellano II, Castellano III,* and *Matter of Bergamine*] against them by holding that they are entitled to VSF benefits . . . to remedy a manifest injustice."

Plaintiffs' reliance on the Court of Appeals' ruling in .8a/iodine (89 NY2d at 56) that VSF payments

do not constitute benefits of a retirement or pension system to support their claims, is misplaced. The Court of Appeals, in *Ballentine* (89 NY2d at 56), expressly noted that the sole reason that the Legislature had labeled the VSF as a non-pension benefit was so that a change in benefits could be effectuated by the Legislature and survive challenge under Article V, section 7, the State constitutional provision that protects the benefits of membership in a public employee retirement system from diminishment or impairment.

Contrary to plaintiffs' argument, the Court of Appeals' recent statement in *DeLuca v Deluca* (97 NY2d 139, 145 [2001]) that the VSF is "a form of compensation for past services related to the first 20 years of [firefighters'] employment, notwithstanding the date they matured," also does not provide support for plaintiffs' claim. Such statement was made in the context of a matrimonial action and addressed the dissimilar issue of whether a non- titled spouse could receive an equitable share of the VSF, finding that such spouse was entitled to do so; such issue was determined by relevant provisions of the Domestic Relations Law concerning marital property (see id. at 143-144).

Plaintiffs' further theories, set forth in their complaint, that they are entitled to VSF benefits due to alleged rights derived from the collective bargaining agreements and from Equal Protection Clause violations were also previously litigated and expressly rejected in *Castellano* 11(142 F3d at 73-74). Thus, plaintiffs' third and fifth causes of action are barred by the doctrine of res judicata and must be dismissed (see

CPLR 3211 [a] [5], 3212 [b]; *McDonough*, 2000 WL 1804137 at * 6; *Castellano III*, 251 AD2d at 194-195).

Plaintiffs' first and sixth causes of action, which seek an accounting, is based upon their contention that there have been illegal transfers of VSF funds. However, inasmuch as the legality of these complained-of transactions has been upheld by the courts (see *Gagliardo*, 89 NY2d at 76; *McDonough*, 2000 WL 1804137, at * 7), plaintiffs have no claim for such relief and such causes of action must likewise be dismissed (see CPLR 3211 [a] [5], 3212 [b]).

Plaintiffs predicate their fourth cause of action on their argument that defendants, by funding VSF benefits from FDPF assets, have caused the FDPF money to be utilized for the payment of non-pension benefits in violation of Internal Revenue Code (26 USC) § 401 (a) (2), the exclusive benefit rule, which prohibits pension fund contributions from being utilized for non-pension payments. They contend that defendants, by doing so, have destroyed the tax-exempt status of these funds.

Plaintiffs' contention is without merit. Paragraph 4 of a Closing Agreement of Final Determination Covering Specific Matters (the Closing Agreement), entered into by the City of New York with the Internal Revenue Service in January 2003, states that "Nile Commissioner will not treat the transfers from ... the New York Fire Department Pension Fund . . . to their VSFs as a violation of section 401 (a) (2) of the Code." In *Cinotti v Giuliani* (5 Misc 3d 1007 (A), 2004 WL 2376481, * 4 [Sept. 13, 2004]), the Supreme Court, New York County, in addressing this same claim now made by plaintiffs, specifically held that the Closing Agreement fully disposes of this claim and

renders it moot since the tax- exempt status of NYCERS as a result of the operation of the VSFs "is under no cloud, due to any purported violations of the exclusive benefit rule." Said court also ruled that the plaintiff-retirees, who were former corrections officers and members of NYCERS, had no standing to maintain this claim. Thus, plaintiffs' fourth cause of action likewise lacks merit, and is also barred pursuant to the doctrines of res juclicata and stare decision (*see* CPLR 3211 [a] [5], [a] [7]; 3212 [b]).

Consequently, inasmuch as all of the causes of action set forth in plaintiffs' complaint are barred by res judicata and stare decisis and/or fail to state a legally cognizable claim, summary judgment dismissing-plaintiffs' complaint as against the Municipal Defendants must be granted on this basis (*see* CPLR 3211 [a] [51, 3212 [bJ). In addition, it is noted that insofar as the Municipal Defendants seek dismissal of plaintiffs' complaint based upon a lack of standing, the Court of Appeals, in *Gagliardo* (89 NY2d at 76), ruled that plaintiffs who are not eligible to receive VSFs are not impaired by the transfer of excess pension fund earnings to the VSFs and "are not aggrieved by and lack standing" to challenge any part of the legislation changing the VSF from a variable to a defined benefit payment (see also McDonough, 2004 WL 2376481 at * 4). Thus, plaintiffs also lack standing to assert these claims (*see* CPLR 3212 [b]).

Plaintiffs' complaint as against the UFOA and the UFA, insofar it contains the same general allegations as directed as against the Municipal Defendants, must be dismissed for the same reasons as herein above set forth. Plaintiffs' complaint's specific allegations as against the UFOA and the UFA concern

their "fiduciary duty" to take certain actions to prevent the way the VSF monies have been used. The duty owed by a union to its past and present members is the duty of fair representation. The primary action which plaintiffs challenge, i.e., the establishment of the VSFs, occurred in 1968, and the conversion of the VSFs to a defined benefit plan occurred, at the latest, in 1989, when the statute establishing the defined plan was enacted. The collective bargaining relating to such establishment and conversion of the VSFs preceded such times. Thus, to the extent that plaintiffs' complaint's allegations that the UFOA and the UFA failed to prevent the use of monies from the FDPF for payment of VSF benefits may be construed as a claim for breach of the duty of fair representation, it is time-barred by the four-month Statute of Limitations of CPLR 217 (2) (a) and must be dismissed (see CPLR 3211 [a] [5]).

Moreover, plaintiffs have not stated any cognizable claim for breach of the duty of fair representation by the UFOA or the UFA since they have "failed to set forth any facts to show either arbitrariness, discrimination or bad faith conduct on the part of [the UFOA or the UFA] in discharging their duties" (Matter of *Bergamine*, 202 AD2d at 202). Therefore, the UFOA and the UFA are entitled to summary judgment dismissing plaintiffs' complaint as against them (see CPLR 3211 [a] [5], [a] [7]; 3212 [b]).

Accordingly, the Municipal Defendants' motion, the UFOA's motion, and the UFA's motion for summary judgment dismissing plaintiffs' complaint as against them, are granted. The UFOA's motion, insofar as it seeks an award of the attorney's fees and costs

incurred by it in making its motion is denied as such relief is not warranted herein.

This constitutes the decision and order of the court.

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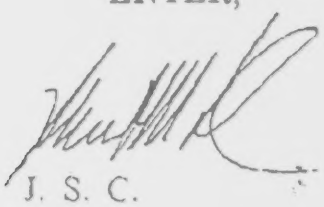

J. S. C.